MUI Plaza Sdn Bhd v Hong Leong Bank Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S2-22-187 OF 1996
KAMALANATHAN RATNAM JC
14 JANUARY 1998

Civil Procedure *— Summary judgment — Claim for shortfall in rental — Whether tenancies entered into were in breach of s 132E of the Companies Act 1965 — Whether there was conspiracy to defraud new purchasers of the defendant — Whether claim for unliquidated sum suitable for summary judgment — Whether triable issues raised — Companies Act 1965 s 132E*

Companies and Corporations *— Directors — Dealings with person connected with director — Tenancy agreements between parties — Whether parties to the tenancies were connected by virtue of ss 122A and 132E of the Companies Act 1965 — Whether tenancies voidable at instance of the tenant — Whether elements of s 132E satisfied — Companies Act 1965 ss 122A & 132E*

At all material times, the original owner of MUI Plaza was the plaintiff who rented out 13 premises therein to Hong Leong Bank Bhd ('the defendant'), formerly known as MUI Bank. On 13 November 1993, Malayan United Industries Bhd ('MUIB') sold MUI Bank to Hong Leong Credit Bhd. MUI Bank thus changed its name to that of the defendant. In June 1994, the defendant indicated its intention to terminate existing tenancies to the plaintiff. The plaintiff agreed subject to payment of full rental for the unexpired term. This was confirmed by the minutes of the real estate agents appointed by the defendant to find replacement tenants for the 13 tenancies it intended to vacate. This was not disputed in 7 of the 13 tenancies. The defendant remained in occupation of the various tenancies until January 1995 wherein the plaintiff found replacement tenants but at a lower rental. The plaintiff brought a claim against the defendant for the shortfall in rental on all 13 premises for the unexpired term of the tenancies. The plaintiff applied for summary judgment of an unliquidated sum and the deputy registrar allowed the claim. The defendant appealed.

In its appeal, the defendant argued that the tenancies were voidable and avoided by the defendant by virtue of the provisions of s 132E of the Companies Act 1965 ('the Act'). In this regard, the defendant argued that the decision taken by the defendant (as then constituted) was taken by the management committee on 3 August 1993. Out of the six disputed tenancies, three were to expire on 28 February 1994, one on 31 July 1994 and two on 31 August 1994. At that point in time, both the plaintiff and the defendant were owned by MUIB wherein at all material times Tan Sri Khoo Kay Peng was a substantial shareholder. As a result, the defendant argued that by virtue of s 132E of the Act, the tenancies could not be enforced by the plaintiff as against the defendant as no resolutions as required were passed. It was not in dispute that the transaction was

not first approved by the defendant (as then constituted). The defendant further argued that there was a conspiracy between the plaintiff and the then directors and senior management of the defendant, in view of the imminent takeover of the defendant, to injure the defendant by entering into renewed tenancies at a much earlier time than required with the desired purpose to 'lock in' the defendant to such renewed tenancies. As a result, the defendant was seeking to bring in as additional defendants the various directors and senior management of the defendant (as then constituted).

Held, allowing the appeal:

(1) Three conditions must be satisfied before s 132E of the Act is to be invoked, namely: (i) there is an arrangement or transaction between a company with a person connected; (ii) to acquire from such a person; and (iii) any non-cash assets of the requisite value of not less than RM10,000 but exceeding RM250,000 or 10% of the company's assets value.

It was evident by a reading of s 122A of the Act that the plaintiff was a person connected to the defendant. At that point in time, MUIB had a controlling interest in both the plaintiff and defendant (as then constituted) by virtue of s 122A(3) of the Act. Each tenancy and the combined value of the six tenancies in dispute would exceed RM250,000. It was a triable issue whether each tenancy was to be construed separately or to be valued together (see pp 209H and 210A, F).

(2) For an arrangement or transaction to occur within the meaning of s 132E of the Act, there must be a unity of purpose whereby each of two or more parties intentionally aroused in writing, in the other, an expectation that he will act in a certain way and he incurred at least a moral obligation to do so (see p 210H); *Re British Basic Slag Ltd's Agreement* [1963] 2 All ER 807 followed.

For the six tenancies, it was clear that the landlord and tenant were the same parties, the tenants were in the same premises, the decision to renew was taken at the same time and for the same reasons. There was a clear unity of purpose to constitute an arrangement within the meaning of s 132E of the Act. As such, the tenancies were voidable at the instance of the defendant by virtue of s 132E of the Act unless ratified by the company at a general meeting. Evidence was required to prove such ratification and this raised a triable issue (see pp 210I and 211A–C).

(3) As for the issue of conspiracy, the contention that conspiracy existed between the plaintiff and the then directors of the defendant to injure the defendant needed to be adjudicated at trial. In this regard, the issues as to whether the parties were aware of Hong Leong's interest in the defendant, the renewal of the tenancies much earlier than required and the allegation that the tenancies were saddled with excessive rentals were triable

issues raised. Moreover, the counterclaim arising from the defence of the conspiracy if proven would provide a complete answer to the plaintiff's claim (see pp 211D and 212F–G, I).

(4) Since the plaintiff's claim for damages was unliquidated, it was wholly unsuitable for summary judgment unless there was clear and cogent evidence of a lack of defence (see p 213C); *Credit Corp (M) Bhd v Bulan Sabit Sdn Bhd & Ors* [1989] 2 MLJ 127 followed.

[Bahasa Malaysia summary

Pada semua masa material, pemilik asal MUI Plaza adalah plaintif yang menyewakan 13 premis di dalamnya kepada Hong Leong Bank Bhd ('defendan'), dahulunya dikenali sebagai MUI Bank. Pada 13 November 1993, Malayan United Industries Bhd ('MUIB') menjual MUI Bank kepada Hong Leong Credit Bhd. MUI Bank dengan itu menukar namanya kepada nama defendan. Dalam bulan June 1994, defendan menyatakan hasratnya untuk menamatkan penyewaan yang ada sekarang kepada plaintif. Plaintif bersetuju tertakluk kepada bayaran penuh sewa untuk tempoh yang masih belum tamat. Ini telah disahkan oleh minit ejen harta tanah yang dilantik oleh defendan untuk mencari penyewa ganti kepada 13 penyewaan yang ia berhasrat untuk mengosongkannya. Ini tidak dipertikaikan dalam 7 daripada 13 penyewaan itu. Defendan terus menduduki penyewaan itu sehingga Januari 1995 di mana plaintif menjumpai penyewa ganti tetapi pada sewa yang lebih rendah. Plaintif membuat tuntutan terhadap defendan untuk kurangan dalam sewa bagi kesemua 13 premis untuk tempoh yang masih belum tamat. Plaintif memohon penghakiman terus untuk jumlah tak tertentu dan penolong pendaftar membenarkan tuntutan. Defendan telah merayu.

Dalam rayuannya, defendan berhujah bahawa penyewaan itu boleh batal dan boleh dielakkan oleh defendan disebabkan oleh peruntukan-peruntukan s 132E Akta Syarikat 1965 ('Akta tersebut'). Berkaitan dengan ini, defendan berhujah bahawa keputusan yang diambil oleh defendan (seperti yang terdapat pada ketika itu) telah diambil oleh jawatankuasa pengurusan pada 3 Ogos 1993. Daripada enam penyewaan yang dipertikaikan, tiga akan tamat tempohnya pada 28 Februari 1994, satu pada 31 Julai 1994 dan dua pada 31 Ogos 1994. Pada masa itu, plaintif dan defendan dimiliki oleh MUIB di mana pada semua masa material Tan Sri Khoo Kay Peng merupakan pemegang saham yang besar. Akibatnya, defendan berhujah bahawa berdasarkan s 132E Akta tersebut, penyewaan tidak boleh dikuatkuasakan oleh plaintif terhadap defendan kerana tiada resolusi seperti yang dikehendaki telah diluluskan. Adalah tidak dipertikaikan bahawa transaksi itu tidak diluluskan terlebih dahulu oleh defendan (seperti yang terdapat pada ketika itu). Defendan selanjutnya berhujah bahawa terdapat komplot di antara plaintif dan pengarah-pengarah dan pengurusan kanan defendan pada ketika itu,

berdasarkan ambil alih yang pasti oleh defendan, untuk merugikan defendan dengan memasuki penyewaan yang diperbaharui pada masa yang lebih awal dari yang dikehendaki dengan tujuan untuk membiarkan defendan dengan penyewaan yang diperbaharui itu. Akibatnya, defendan memohon untuk membawa pengarah-pengarah dan pengurusan kanan defendan (seperti yang terdapat pada ketika itu) sebagai defendan-defendan tambahan.

Diputuskan, membenarkan rayuan:

(1) Tiga syarat mesti dipenuhi sebelum s 132E Akta tersebut boleh digunakan, iaitu: (i) terdapat pengaturan atau transaksi di antara sebuah syarikat dengan seseorang yang berkaitan; (ii) mengambil daripada orang itu; dan (iii) apa-apa aset bukan wang dengan nilai yang diperlukan tidak kurang daripada RM10,000 tetapi melebihi RM250,000 atau 10% daripada nilai aset syarikat.

Adalah terbukti daripada pembacaan s 122A Akta tersebut bahawa plaintif merupakan seorang yang berkait dengan defendan. Pada masa itu, MUIB mempunyai kepentingan yang mengawal dalam plaintif dan defendan (seperti yang terdapat pada ketika itu) berdasarkan kepada s 122A(3) Akta tersebut. Tiap-tiap penyewaan dan nilai gabungan enam penyewaan yang dipertikaikan akan melebihi RM250,000. Adalah satu isu yang boleh dibicarakan sama ada tiap-tiap penyewaan perlu ditafsirkan berasingan atau perlu dinilaikan bersama-sama (lihat ms 209H dan 210A, F).

(2) Untuk satu aturan atau transaksi terjadi dalam ertikata s 132E Akta tersebut, mesti terdapat perpaduan tujuan di mana tiap-tiap dua atau lebih pihak dengan sengaja menimbulkan secara bertulis, pada satu pihak yang lain, satu jangkaan bahawa beliau akan bertindak dalam cara tertentu dan beliau mempunyai sekurang-kurangnya kewajipan moral untuk melakukannya (lihat ms 210H); *Re British Basic Slag Ltd's Agreement* [1963] 2 All ER 807 diikut.

Untuk enam penyewaan itu, adalah jelas bahawa tuan tanah dan penyewa adalah pihak yang sama, penyewa berada dalam premis yang sama, keputusan untuk membaharui diambil pada masa yang sama dan atas sebab yang sama. Terdapat perpaduan tujuan yang jelas untuk menjadikannya aturan dalam ertikata s 132E Akta tersebut. Oleh yang demikian, penyewaan-penyewaan itu adalah boleh batal atas permintaan defendan berdasarkan kepada s 132E Akta tersebut melainkan diratifikasikan oleh syarikat di mesyuarat agung. Keterangan diperlukan untuk membuktikan ratifikasi itu dan ini menimbulkan isu yang boleh dibicarakan (lihat ms 210I dan 211A–C).

(3) Berkenaan dengan isu komplot, hujah bahawa komplot wujud di antara plaintif dan pengarah-pengarah defendan pada ketika itu untuk merugikan defendan perlu dihakimi di perbicaraan. Berkaitan dengan ini, isu sama ada pihak-pihak mengetahui

kepentingan Hong Leong dalam defendan, pembaharuan penyewaan lebih awal dari yang diperlukan dan pengataan bahawa penyewaan itu dibebani dengan sewa yang berlebihan adalah isu yang boleh dibicarakan yang telah ditimbulkan. Tambahan pula, tuntutan balas yang timbul daripada pembelaan komplot jika dibuktikan akan memberikan jawapan yang penuh kepada tuntutan plaintif (lihat ms 211D dan 212F–G, I).

(4) Oleh kerana tuntutan plaintif untuk ganti rugi adalah untuk jumlah tak tertentu, adalah sangat tidak sesuai untuk penghakiman terus melainkan terdapat bukti yang jelas dan meyakinkan tidak terdapatnya pembelaan (lihat ms 213C); *Credit Corp (M) Bhd v Bulan Sabit Sdn Bhd & Ors* [1989] 2 MLJ 127 diikut.

Notes

For cases on summary judgment, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 4372–4778.

For cases on directors, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 89–197.

Cases referred to

British Basic Slag Ltd's Agreement, Re [1963] 2 All ER 807 (folld)

Credit Corp (M) Bhd v Bulan Sabit Sdn Bhd & Ors [1989] 2 MLJ 127 (folld)

MGG Pillai v Tan Sri Dato' Vincent Tan Chee Yioun and other appeals [1995] 2 MLJ 493 (refd)

Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281 (refd)

Legislation referred to

Companies Act 1965 ss 122A, 122A(1)(b), (3)(b), (c), 132E, 132E(1), (2), (5)

Rules of the High Court 1980 O 14

Robert Lazar (*LH Liew* with him) (*Shearn Delamore & Co*) for the appellant/defendant.

N Navaratnam (*N Navaratnam & Co*) for the respondent/plaintiff.

Cur Adv Vult

Kamalanathan Ratnam JC:

The claim

This is an appeal against the decision of the learned deputy registrar granting summary judgment for the whole of the plaintiff's claim as set out in the re-amended statement of claim. In essence, the plaintiff's claim is

for the difference in rental reviewed on 13 premises all situated in a building known as MUI Plaza, after the defendant terminated these tenancies before their expiry and moved to its own building. The plaintiff who is the owner of MUI Plaza was then forced to find new tenants for each of the 13 premises but the rental obtainable was lower than that paid by the defendant previously. Accordingly, the plaintiff claims for the shortfall in rental for the entire unexpired term of each tenancy in question. The claim in total is for RM3,298,067.25. However, the plaintiff has forfeited rental and utility deposits amounting to RM810,709.66 and the balance claimed therefore is RM2,487,357.59. In addition, the plaintiff is also claiming the cost of reinstatement works amounting to RM6,494.55.

The common facts

At all material times, the owners of MUI Plaza have been the plaintiff. Thirteen premises within MUI Plaza were rented by the plaintiff to MUI Bank Bhd, a registered bank that was previously owned by Malayan United Industries Bhd ('MUIB'). On 11 November 1993, MUIB sold all its shares in MUI Bank Bhd to Hong Leong Credit Bhd. Thereafter, MUI Bank Bhd changed its name to Hong Leong Bank Bhd, the defendant. As a result thereof, the tenant of the 13 premises in question became, by change of name, Hong Leong Bank Bhd. In June 1994, whilst all 13 tenancies were in force, the defendant indicated an intention to terminate each of the 13 tenancies before the expiry of their respective terms. This termination was accepted by the plaintiff subject to payment by the defendant of rentals for the full unexpired term. This was confirmed by the minutes of a meeting held on 23 June 1994 kept by Jones Lang Wootton who were the real estate agents appointed by the defendant to find replacement tenants for the 13 premises. The defendant remained in occupation of the various premises and continued to pay rent up until January 1995 although the change in its management and ownership took place in January 1994. There is in any case no dispute over seven of the 13 tenancies.

Issues raised by the defence

The defendant contends that the tenancies were voidable and have been avoided by the defendant under s 132E of the Companies Act 1965 ('the Act') and that therefore the plaintiff cannot recover. The defendant also argues that there was a conspiracy by the plaintiff and the then management of the defendant to injure the defendant. It is also the contention of the defence that the plaintiff must prove its damage by showing that the rental it obtained from the substitute tenants was a fair market rental.

The law relating to O 14 of the Rules of the High Court 1980

An O 14 application is an application for summary judgment and, in this context, I can do no better than to make a mediocre copy of another man's genius by repeating the words of Gopal Sri Ram JCA in *Ng Hee Thoong &*

Anor v Public Bank Bhd [1995] 1 MLJ 281 wherein his Lordship said at p 289:

> It is important to bear in mind that O 14 is a summary judgment procedure and not a summary trial procedure.

The s 132E issue

I am told that there is no decided case in Malaysia on this issue.

Section 132E of the Act reads:

> (1) Subject to section 132F, a company shall not enter into any arrangement or transaction with a director of the company or its holding company or with a person connected with such a director to acquire from or dispose to such a director or person any non-cash assets of the requisite value unless the arrangement or transaction is first approved by a resolution of the company in general meeting and also, if the director or connected person is a director of its holding company or person connected with such a director, by a resolution of the holding company in general meeting.

The decision by the defendant to enter into these disputed tenancies was taken at a management committee meeting of the defendant bank held on 3 August 1993. At that time, these premises were already the subject of existing leases which had been entered into in 1991. As at 3 August 1993, out of the six disputed tenancies, three of the tenancies were to expire on 28 February 1994, one on 31 July 1994 and two on 31 August 1994. To my mind, the material date by which these transactions ought to be examined for the purposes of the O 14 application is the date of the decision to enter into these transactions, that is, on 3 August 1993. On that date, the defendant was then known as MUI Bank and was owned by MUIB. The plaintiff landlord was also owned by MUIB. Both the plaintiff and defendant thus clearly boasted of the same lineage. Tan Sri Khoo Kay Peng ('Tan Sri') was at all material times a substantial shareholder of MUIB and by parity of reasoning both the plaintiff and the defendant were connected to Tan Sri. On this premise, the defence launched its attack that by virtue of s 132E of the Act, the said tenancies cannot therefore now be enforced by the plaintiff against the defendant. There are three conditions to be satisfied before s 132E of the Act is to be invoked:

(1) that there is an arrangement or transaction between a company with a person connected;

(2) to acquire from such person; and

(3) any non-cash assets of the requisite value.

I am quite satisfied that the defendant MUI Bank Bhd would fit the cap of 'a company' and that the plaintiff would perfectly fit the description of a 'person connected' as stated in condition (1). Once these three conditions are satisfied, then it can be fairly said that s 132E will apply because there is no dispute that this arrangement or transaction was NOT first approved by a resolution of the company in general meeting.

Meaning of 'person connected'

I have no hesitation in concluding that the plaintiff is a 'person connected' to the defendant. The definition of person connected is to be found in s 122A of the Act which reads:

> (1) For the purposes of this Division a person shall be deemed to be connected with a director if he is — ...
>
> (b) a body corporate which is associated with that director; or ... .

Section 122A(3) goes on to provide that for the purposes of sub-s (1)(b), a body corporate is associated with a director if:

> (b) that director has a controlling interest in the body corporate; or
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> (c) that director or persons connected with him, or that director and persons connected with him, are entitled to exercise, or control the exercise of, not less than fifteen per centum of the votes attached to voting shares in the body corporate.

I find that Tan Sri, being a substantial shareholder of MUIB, had a controlling interest in both the plaintiff and the defendant and he did control the exercise of not less than 15% of the voting rights attached to both the plaintiff and defendant.

Acquisition of a non-cash asset of a requisite value

Section 132E(5) states that a non-cash asset is of the requisite value if at the time of the arrangement or transaction, its value is not less than RM10,000 but subject to that exceeds RM250,000 or 10% of the company's asset value. It is not difficult to compute that the total worth of all the six tenancies in question would most certainly exceed RM250,000. For that matter, even taken individually, each tenancy by itself exceeds RM250,000. The plaintiff contends that each tenancy is to be construed separately and that the total value of the six tenancies should not be added together as maintained by the defendant. To my mind, this in itself is a triable issue.

Meaning of arrangement or transaction

These are the terms used in s 132E(5) of the Act and it is useful to consider their meaning.

In *Re British Basic Slag Ltd's Agreement* [1963] 2 All ER 807, Williams LJ said that where each of two or more parties intentionally arouses in writing, in the other, an expectation that he will act in a certain way, he incurs at least a moral obligation to do so and that this can be considered an arrangement. Presumably, his Lordship must have had in mind 'unity of purpose' for what is unity without a purpose. Taking the details of these six tenancies, it is not difficult to see that the landlord was the same party, the tenant was the same party, the premises were all in the same building, the decision was taken at the same time, notwithstanding that the tenancies were to commence from different dates, and the reasons for entering into the tenancies appear to be identical. I therefore find that there is a clear

A unity of purpose to constitute an arrangement or transaction within the meaning of s 132E of the Act. If that be the case then the said tenancies are voidable at the instance of the defendant because s 132E(2) says:

> An arrangement entered into in contravention of subsection (1) and any transaction entered into in pursuance of the arrangement (whether by the
B company or any other person) shall be voidable at the instance of the company unless the arrangement and transaction are, within a reasonable period, ratified by the company in general meeting and also, if the arrangement and transaction are for the transfer of an asset to or by a director of its holding company or a person who is connected with such a director, by a resolution of the holding company in general meeting.

C However, the only way in which it can be ratified is if the company in general meeting decides to ratify the arrangement or transaction. Evidence has to be led that this arrangement or transaction was ratified by the company in general meeting. This clearly raises a triable issue.

D *The conspiracy issue*

On this issue too, I find for the appellant. The contention that a conspiracy existed between the plaintiff and the then directors and senior management of the defendant to injure the defendant needs to be adjudicated at trial. On 3 August 1993 when the decision was taken, there were at least two
E common directors of MUI Bank and MUI Plaza, namely, Tan Sri and Khet Kok Yin. It is pertinent to reproduce a relevant portion of the minutes of the special management committee meeting held on 3 August 1993. It reads:

> The committee met to consider the request by MUI Plaza Sdn Bhd for the
F early renewal of the tenancy agreements for the rental of the office space in MUI Plaza by the bank for its PZ main branch, head office and various departments.
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> The committee noted that the request was made based on the current full occupancy of MUI Plaza and a great demand for office space in the 'Golden Triangle'. The landlord, MUI Plaza Sdn Bhd, would like to ensure
G the continuity of the tenancy for the bank which is one of its anchor tenants.

It seems obvious that although they had constituted themselves as a management committee of the defendant, it would appear that at the time that they met, it was to consider the request by the plaintiff landlord for the early renewal of the tenancy agreements. It is not so much as if it was the
H bank which wanted an early renewal but the plaintiff. As directors and senior personnel of the defendant bank, they owed a duty to the defendant to act in its best interest.

A further issue raised by the defence has caught my attention. The leases in question were only expiring in February, July and August 1994.
I Yet the committee decided in August 1993 to consider such a request although the affected tenancies had at least between seven to 12 months before they actually expired and between four to nine months before the option could be exercised. The defendant contended that the plaintiff did so because at that time the Hong Leong Group, through a company

known as Hong Leong Credit Bhd had expressed an interest in acquiring MUI Bank from MUIB and that the prospects of such a takeover were imminent. The defendant suggests that the owners of MUI Bank decided that they would lock in MUI Bank by the affected tenancies and in the process unjustly benefit MUI Plaza. It was suggested that that was the reason they acted in August 1993. If they had acted any later, it would be apparent that MUI Bank would have come under the control of Hong Leong and that therefore the two parties would no longer be controlled by the same persons.

The plaintiff referred to the affidavit of one Christopher Martin Boyd (encl 22) who stated in the said affidavit that the offer by Hong Leong Credit Bhd to buy the shares in MUI Bank (the defendant) was only made in October 1993. From the said affidavit it is apparent, argues the plaintiff, that the Hong Leong Group was until 4 October 1993 enmeshed in efforts to gain control of Ban Hin Lee Bank and that it was only after this failed that it turned its attention to MUI Bank. It was pointed out that there was no affidavit to rebut this.

I do not accept this argument. Enclosure 22 was filed in response to encl 15 and therefore the matter was already in issue. The court must be wary and oft chary and prevent an unending stream of affidavits to be filed one after the other. In such a situation, the last person with unbridled stamina to affirm an affidavit will have the opportunity to assert that his evidence must stand unrebutted notwithstanding the fact that by direct evidence or by inference a challenge has already been raised in the earlier affidavits. In the case before me in encl 15, the defendant contends that the Hong Leong Group through Hong Leong Credit Bhd had expressed an interest in acquiring MUI Bank from MUIB and that the prospects of such a takeover were imminent. However, by way of encl 22, the plaintiff states that no approaches were made until middle of October 1993. In the circumstances, an issue has already clearly arisen as to when the parties were aware of Hong Leong Group's interest in the defendant.

Another allegation by the defence is that the tenancies were saddled with the burden of excessive rentals. This is evident from the fact that when Hong Leong Bank did move out, the rentals that the plaintiff received appeared to be well below what had been charged to MUI Bank. The senior management and common directors must therefore explain. Again, a triable issue has been raised.

Possible counterclaim

Using conspiracy as the linchpin, the defendant now contends that it would be necessary to bring in as defendants, to a counterclaim by original action, the various directors and senior management. To my mind, if the defendant succeeds in proving conspiracy it would provide a complete answer to the plaintiff's claim. As was said by Gopal Sri Ram JCA in *MGG Pillai v Tan Sri Dato' Vincent Tan Chee Yioun and other appeals* [1995] 2 MLJ 493 at p 515:

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> ... Conspiracy is a tort that is not always capable of proof by direct evidence. Like so many other facts, an agreement to do an unlawful act or a lawful act by unlawful means may be established by evidence of circumstances from which such an agreement may be inferred: *Barindra Kumar Ghose & Ors v The Emperor* (1909) 14 CWN 1114. It is axiomatic that there must be proof and not mere conjecture.

B

Unliquidated damages claimed

Further, the plaintiff's claim for damages being unliquidated, it is my judgment that such a case is wholly unsuited for summary judgment unless there is clear and cogent evidence of a lack of defence. I accept and adopt C what was said by Shankar J (as he then was) in *Credit Corp (M) Bhd v Bulan Sabit Sdn Bhd & Ors* [1989] 2 MLJ 127. His Lordship said at p 128:

> ... One cannot convert an unliquidated claim to a liquidated one merely by putting down some allegedly precise mathematical calculation.

D I am therefore of the view that this is not a proper case for summary judgment. I therefore allowed the appeal and set aside the judgment of the learned deputy registrar and gave the defendant unconditional leave to defend with costs. In order to expedite the matter, I fixed the case for case management and directed the plaintiff to file the summons for directions.

E *Appeal allowed; judgment set aside.*

Reported by Lew Chee Seong

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